Supreme Court, U.S.
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No. 98-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JACQUELYN POUNDS,

Petitioner,

vs.

DOUGLAS COUNTY BOARD OF COMMISSION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE ISSUES

1. Did the Eleventh Circuit Court of Appeals properly affirm the decision of the district court to grant summary judgment in favor of the Respondents?

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Courts Below

Petitioner Jacquelyn Pounds brought suit alleging a denial of her due process rights and unlawful discrimination and retaliation based upon her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended ("Title VII") and 42 U.S.C. §§ 1981 and 1983. At the conclusion of discovery, Respondents (hereinafter "Respondents" or "Douglas County") moved for summary judgment. (R2-19).

On December 1, 1995, the United States Magistrate Judge issued his report and recommendation that Douglas County's motion for summary judgment be granted in its entirety and that the case be dismissed. On March 29, 1996, the district court adopted the majority of the Magistrate's conclusions and ordered that Douglas County was entitled to summary judgment on all claims raised by Petitioner with the exception of her Title VII claim of racial harassment based upon a hostile work environment. (R4-41-7-8).

On April 19, 1996, Douglas County timely moved for reconsideration of the district court's Order denying summary judgment on Petitioner's racial harassment claim. (R4-44). On March 7, 1997, the district court entered an Order granting Douglas County summary judgment on Petitioner's remaining hostile environment claim. (R4-49). Based upon a lack of any significant evidence of pervasive racial harassment, the district court concluded that the record failed to support a finding of constructive or actual knowledge of the alleged racial harassment and that Douglas County was thus insulated from liability. (R4-49-10).

In reaching its final conclusion to grant summary judgment in favor of the Respondents, the district court agreed with Douglas County that there was no evidence within the record which would support a proposition that Douglas County "knew or should have known" of the alleged harassment yet failed to take prompt remedial action. The district court concluded that the totality of circumstances presented — seven statements allegedly made by various individuals (including prisoners and non-supervisory personnel) over a three year time span, all of which were unknown to managers within the Douglas County Sheriff's Department — could not support a finding of egregious behavior sufficient to impute constructive knowledge of the alleged misconduct to Douglas County. A judgment in favor of Douglas County was entered by the United States District Court for the Northern District of Georgia on March 13, 1997.

Significant for purposes of this Petition, the district court found that Douglas County maintained, and Petitioner was aware of, a policy prohibiting discrimination in employment on the basis of race. This policy was found by the district court to "not discourage [Petitioner] from reporting the alleged harassment." (R4-49 at note 4). The district court further determined that Petitioner utterly failed to initiate any grievance based upon the alleged discrimination. (R4-49-7).

Petitioner appealed the dismissal of her Title VII claims to the United States Court of Appeals for the Eleventh Circuit on April 7, 1997. (R4-52). In her appeal before the Eleventh Circuit, Petitioner urged for a finding of error based upon the district court's conclusions that the record failed to establish that Douglas County knew or should have know of the alleged racial harassment against Petitioner or that Douglas County failed to take prompt remedial action upon being advised of such conduct. Petitioner did not appeal any of the issues or

findings contained within the district court's first Order, dated March 29, 1996. (R4-41).

In a per curium decision, the Eleventh Circuit upheld the granting of summary judgment in favor of Douglas County. The court ruled the Plaintiff had failed to establish any facts sufficient to demonstrate that Douglas County had actual knowledge of the harassment or that the harassment was sufficiently pervasive to charge Douglas County with constructive knowledge.

> Pounds wholly failed to present any evidence indicating that Douglas County had actual knowledge of the harassment. Although Pounds alleges generally that Douglas County had actual knowledge of the harassment, the record does not support such an inference. Throughout her tenure, Pounds did not complain to anyone about the harassment and only reported the incidents immediately prior to her termination, rendering prompt remedial action impossible.

(Appendix C).

Petitioner hereafter apparently sought a rehearing of this decision by the Eleventh Circuit (counsel for Respondent was not served or notified of any such request) and reconsideration was declined by the Court on June 2, 1998.

B. Statement Of The Facts

Because Petitioner has misstated several facts within the record, Respondents, pursuant to Rule 15.2, state the relevant facts for purposes of this appeal. Many of the asserted facts relied upon by Petitioner are based upon presumed inferences

from her affidavit testimony submitted in response to Douglas County's motion for summary judgment filed in the district court. Petitioner failed to include her affidavit in the Record Excerpts filed with her appeal in the court below. The relevant factual findings made by the district court are well-supported by the record and have not been challenged or demonstrated as erroneous in the Petition submitted herein.

1. *Petitioner's Employment With The Douglas County Sheriff's Department*

Petitioner was employed by the Douglas County Sheriff's Department as a secretary/receptionist from November 18, 1990 through June 15, 1993. Over the course of her tenure of almost three years, she alleged she was subjected to a hostile work environment based upon her race. In support of this contention, Petitioner was able to identify seven isolated incidents which consist of her allegedly having overheard (1) a racial epithet as part of a conversation between two white inmates in 1990; (2) a conversation between two unidentified white officers discussing the prospect of bringing police dogs into the jail to scare inmates so that they would not bring drugs or cigarettes into the jail; (3) a comment by an unidentified female detective in which a childhood rhyme was recited which contained no racial epithets; (4) a statement made by Major Stan Copeland on an unknown date referencing an inmate in the jail by the term of "black ass"; (5) a discussion in April 1993 involving Detective Scott Cospers in which the phrase "Black Wednesday" (referencing a phrase contained within local media reports describing a boycott of local stores proposed by local black leaders) was made; (6) a reference made at an unknown time to Petitioner as "Buckwheat" by one of her co-workers; (7) and an overheard conversation between Respondent Phil Miller and Petitioner's brother-in-law in which Respondent Miller is alleged to have said "come here, nigger." Petitioner

acknowledged that her brother-in-law, Tim Pounds, an Officer in the Sheriff's Department, explained to Petitioner that the two men were joking around as friends and that *he was not offended* by the remark. The record is undisputed that Major Miller also apologized to Petitioner upon learning that she overheard his statement. The record further reveals that when Petitioner first brought this incident to the attention of Sheriff Waldrop during the course of Petitioner's termination, he promptly took remedial action by speaking with Major Miller and advising him that such comments, even in jest, were inappropriate under any circumstances. (R3-34-3,4,5; Appendix C).

Contrary to the representations contained within the Petition, there is no evidence within the record to indicate that, during the course of Petitioner's employment with Douglas County, Petitioner's direct supervisor, Respondent Lieutenant Tim Brumbelow or Sheriff Waldrop were aware of any complaints of racial harassment made by Petitioner during the course of her leave of absence. In her Petition before this Court, Petitioner misstates the testimony of Lt. Brumbelow. (R4-40). As stated by the district court, "[t]he court has not found any evidence that [Petitioner] previously notified Brumbelow of her complaints regarding these racially derogatory comments." (R4-49-6).

The record of the district court clearly supports its conclusion that Petitioner failed to establish the existence of an atmosphere permeated by racial discrimination. (R4-49-9-10). Petitioner's superiors had neither actual nor constructive knowledge of any racially discriminatory conduct. Moreover, the record clearly establishes that Petitioner failed to bring any concerns she may have had regarding alleged racial discrimination to the attention of Douglas County officials despite her admitted familiarity with Douglas County's policy

prohibiting such discrimination and the avenues for initiating grievances over such matters.

2. *Douglas County's Equal Employment Opportunity Policy And The Merit System*

Douglas County has an Employee Merit System which provides covered employees (including Petitioner) with an administrative procedure by which to appeal any adverse employment actions including, but not limited to, job discrimination and harassment. (R4-49-5-7; R2-19; Statement of Undisputed Facts at pp. 5-8). Petitioner received a copy of the Employee Merit System Handbook at the time she was hired by Douglas County. Petitioner acknowledged an awareness of the Merit System and her grievance rights as a Douglas County employee. (R2-19; Statement of Undisputed Facts at pp. 5-8).

Douglas County also had in effect a written equal employment opportunity policy. This policy was contained in the Douglas County Employee Merit System Handbook and states as follows:

> It is the policy of the County to provide equal employment to all persons and to prohibit discrimination in employment, because of race, color, religion, sex, national origin, creed, ancestry, political affiliation, physical handicap or age. This policy applies to and is a basic part of every aspect of the County's personnel policy and practices in the employment, development, advancement and treatment of employees.

(R2-19; Statement of Undisputed Facts at pp. 8-9).

In addition to appearing in the employee handbook, which was provided to Petitioner at the inception of her employment

with Douglas County, the policy is also posted on bulletin boards at the Douglas County Board of Commissioner's Office and in the Sheriff's Department where Petitioner worked on a day-to-day basis. In her deposition, Petitioner acknowledged that she never made a written or verbal complaint of any alleged racial discrimination or alleged racially hostile work environment during the course of her employment. The first and only complaint made by Petitioner regarding the treatment of employees on the basis of race was made on June 14, 1993 when she met with Sheriff Waldrop to discuss her proposed termination. (R4-49-6; R2-19; Statement of Undisputed Facts at p. 9; Petitioner's deposition at pp. 90-91, 169-172, 382, 389).

3. *Petitioner's Termination From Employment With Douglas County*

Petitioner's employment with Douglas County was suspended on June 10, 1993 when she left work early without permission from her supervisors. Petitioner based her request to leave early on the grounds that she had heard Major Miller address a white co-worker as "meanie," a comment which Petitioner acknowledges was *not* racially derogatory. Major Miller determined Petitioner's leave request was unjustified under the circumstances and denied her permission to leave work for the remainder of the day. Petitioner was, however, allowed to leave for lunch early, after which she failed to return to work. (R2-19; Statement of Undisputed Facts at pp. 12-14). Petitioner has not challenged the occurrence of her misconduct upon which her termination was based or that her insubordination was a terminable offense within her workplace.

On June 14, 1993, Petitioner met with Sheriff Waldrop to discuss her proposed termination resulting from her absence without leave. Petitioner offered no explanation for her absence but acknowledged that her leave was without permission from

her supervisors. For the first time, Petitioner complained to Sheriff Waldrop regarding a comment she had overheard earlier that year. Petitioner reported that she had overheard Major Miller say "come hear, nigger," to Petitioner's brother-in-law, Tim Pounds. Based on Petitioner's record of poor attendance and her acknowledgment of her absence without leave, her employment with Douglas County was terminated effective June 15, 1993. (R2-19).

Following his June 13, 1993 meeting with Petitioner, Sheriff Waldrop investigated Petitioner's allegations concerning Major Miller's use of a racial epithet. Major Miller acknowledged making the comment and explained that it was made in jest with Officer Tim Pounds, Major Miller's long-time friend. Major Miller further explained that the comment was not intended to have been overheard by Petitioner and that he had previously apologized to Petitioner about the incident. Petitioner acknowledged in her deposition that Major Miller had apologized to her and, further, that Officer Tim Pounds had told her that the comment was a joke and that he reciprocated to Major Miller in a similar manner. (R4-34-5; R2-19; Petitioner's deposition pp. 354-55). Sheriff Waldrop instructed Major Miller to refrain from the use of any racial epithets in the future, whether in a joking manner or otherwise. (R2-19).

SUMMARY OF ARGUMENT

The undisputed record in this case substantiates the decisions of the Eleventh Circuit and the district court that Petitioner failed to present sufficient evidence to allow her claim of a racially hostile work environment to go forward. The lower courts concluded, based upon a review of the evidence in its entirety, that the conduct serving as the foundation of Petitioner's complaint failed to establish an environment of

pervasive and unlawful race discrimination. Moreover, Petitioner has failed to allege or demonstrate any tangible employment action taken against her by any individual who allegedly harassed her. The evidence further demonstrates that Petitioner failed to place Douglas County on notice of her complaints of racial discrimination. The record fails to provide any reasonable explanation for Petitioner's failure to utilize the grievance mechanisms which had been provided. Absent such evidence, Douglas County cannot be held liable for any alleged harassment perceived by Petitioner.

The evidence in this case demonstrates that there is an absence of any material facts that would allow this case to proceed to trial. Summary judgment was appropriate as a matter of law.

ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner Has Failed to Establish A Hostile Work Environment Based On Race

The record in this case compels the conclusion that Petitioner has failed to create a triable issue of fact regarding her claim of racially hostile environment.[1] In order to prevail on a claim for hostile work environment based upon racial discrimination, a Plaintiff must allege and prove the following: (1) she belonged to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based upon her race; and (4) the harassment complained of affected a term, condition or privilege of her employment and

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1. The Court has not previously directly addressed whether a cause of action for *racial* harassment exists until Title VII. However, in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 236, 105 L. Ed. 2d 132 (1989), the Court intimated that racial harassment is actionable under Title VII. *Id.*, 491 U.S. at 180, 109 S. Ct. at 2374.

was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive work environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993), the Court confirmed that not all offensive conduct in the employment setting violates Title VII. Unless the conduct complained of is "so severe or pervasive that it create[s] a hostile environment abusive to employees," such conduct will not be violative of Title VII. *Harris*, 510 U.S. at 22, 114 S. Ct. at 370. The Court made very clear that conduct that is merely offensive will not be actionable. Only severe misconduct that undeniably affects the working relationship will be in violation of the law. Specifically, "The 'mere utterance of an . . . epithet which engenders offensive feelings in an employee' " will not violate Title VII. *Harris*, 510 U.S. at 21, 114 S. Ct. at 370 (quoting *Meritor*, 477 U.S. 67, 106 S. Ct. 2399, 2405 (1986)).

Recently, this Court has again delved into the contours of hostile environment discrimination claims. *Burlington Industries, Inc. v. Ellerth*, __ U.S. __, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). In these two cases, the Court provided welcome guidance as to an employer's possible liability for alleged sexual harassment in the work place. Unlike the present case, the *Burlington* and *Farragher* cases brought before the Court a finding from the district court that the harassing conduct at issue was severe and pervasive. *Burlington Industries, Inc. v. Ellerth*, __ U.S. __, 118 S. Ct. at 2265; *Farragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. at 2281. The record in the instant case reveals that the district court made no such finding based upon the facts presented. To the contrary, the record is clear that, construing the facts most favorably to the Petitioner, that the Petitioner was subjected

only to isolated comments over a three-year time frame. Moreover, the vast majority of the comments upon which the Petitioner has sought to base her claim for liability were neither directed towards her, nor were they reasonably capable of a racially derogatory interpretation. Petitioner's claims must fail, in the first instance, based upon her failure to demonstrate sufficient severity or pervasiveness of the conduct now at issue. *See Harris v. Fork Lift Systems, Inc., supra.* Summary judgment in favor of the Respondents was appropriate.

In the instant case, the Petitioner's allegations simply do not support a hostile work environment claim. Petitioner cites seven comments that she contends support her claim for hostile environment. Petitioner contends these seven comments were made over a two and one-half year period. Petitioner contends she heard the following comments:

(1) A discussion between two unidentified white *inmates* from the jail talking. Petitioner claims one inmate said, "Let the niggers do it." Petitioner contends this comment was made immediately after she transferred to the Sheriff's Department in November 1990.[2] (R2-19; Petitioner's Dep., pp. 61-62, 65-66);

(2) An overheard conversation between two unidentified white male officers discussing taking police dogs into the jail cells and heard one say they were going to "scare them" with the dogs so that no one would bring cigarettes or drugs into the jail. Petitioner contends this comment was made immediately after she transferred to the Sheriff's Department in November, 1990. (R2-19; Petitioner's Dep., pp. 68-70);

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2. Although not addressed by the courts below, the majority of the comments upon which Petitioner bases her claims are clearly time-barred.

(3) Petitioner claims she heard an unidentified female detective say, "eenie, meenie, miney, mo, catch a 'blank' by the toe" (no racial epithet was used). Petitioner does not recall when this comment was allegedly made. (R2-19; Petitioner's Dep., pp. 73-75);

(4) Petitioner claims she heard Major Stan Copeland use the term, "black ass" in referring to an inmate in the jail on one occasion. Petitioner does not recall when this comment was allegedly made. (R2-19; Petitioner's Dep., pp. 108-109);

(5) During a discussion about taking Petitioner to lunch for Secretary's Day, Petitioner contends a detective, Scott Cospers, used the phrase, "Black Wednesday," which Petitioner acknowledged was a reference to a story in the local news concerning a boycott of local stores proposed by local black leaders. The boycott was to take place on Wednesdays. Petitioner contends this comment was made in April 1993. (R2-19; Petitioner's Dep., pp. 92-95, 97-98; Petitioner's Answers and Objections to Defendants' First Interrogatories, No. 28);

(6) Petitioner contends a co-worker, Billy Lashley, called her "Buckwheat," which Petitioner claims was a reference to a character on a television program, "Our Gang." Petitioner could not state when this comment was allegedly made. (R2-19; Petitioner's Dep., pp. 104-105, 299-301); and

(7) Petitioner overheard Major Phil Miller say, "Come here, nigger," to Tim Pounds when Major Miller and Tim Pounds were joking around. Petitioner contends this comment was made sometime in 1993. (R2-19; Petitioner's Dep., pp. 98-103).

The district court found that these alleged comments, viewed in the totality of circumstances in which they were alleged to have occurred, were insufficient to impute constructive knowledge of a racially hostile environment to Douglas County (R4-49-10).

As a threshold matter, Petitioner's claims are focused upon comments that were generally not directed at her. In those limited instances Petitioner alleges the comments were directed at her, they have no direct or logical racially discriminatory meaning. In order for Petitioner's claims to be actionable, the claimed harassment must be severe or pervasive. *Burlington Industries, Inc. v. Ellerth*, __ U.S. at __ , 118 S. Ct. at 2265; *Harris*, 510 U.S. at 21, 114 S. Ct. at 370.

With regard to the first comment, this comment was not directed to Petitioner or intended to refer to her. The comment was allegedly made by an unidentified white *inmate* from the jail during a conversation with another inmate and was not made by or in the presence of an officer of the Sheriff's Department. (R2-19; Petitioner's Dep., pp. 60-62, 65-66). Petitioner herself characterized this comment as "horse-play." (R2-19; Petitioner's Dep., pp. 66-67).

Petitioner contends the second comment was made in the Detective Division near the door leading to the jail and admits she does not know the names of the individuals who made the comment and admits this statement was not made to her directly but rather that the individuals were talking among themselves. (R2-19; Petitioner's Dep., p. 70). Petitioner interpreted this comment to be racially offensive when, in fact, the comment did not contain any reference to race at all. Petitioner offered absolutely no evidence to suggest that the two officers intended this incident to be racially offensive. To the contrary, Petitioner admits the officers were discussing turning dogs loose in the jail *to search for drugs*. (R2-19; Petitioner's Dep., pp. 68-70).

The third comment which Petitioner contends was racially offensive is the "eenie, meenie, miney, mo" comment. With regard to this comment, Petitioner testified:

> I remember one of the detectives going, "who's gonna do . . ." Like, "Who's gonna do an assignment," or something, and they go, "Eenie, meenie, miney, mo, catch a 'blank' by the toe," and it's — because I was standing there, the person used the word "blank" and kept going.

(R2-19; Petitioner's Dep., p. 73).

When asked why she considered this comment to be racially derogatory, Petitioner stated:

> A. (by Petitioner) Well, because that little slogan, "Eenie, meenie, miney, mo, catch a 'blank' . . . ," usually the "blank" is filled in with "nigger," and I knew that. But, she said, "blank," instead of saying the word, and I found it very offensive.

(R2-19; Petitioner's Dep., p. 74). Again, Petitioner could not state who made the comment, could not state who was standing there or who heard the comment, and did not complain to anyone that she found this comment racially offensive. (R2-19; Petitioner's Dep., pp. 74-75).

Petitioner further contended that the use of the term "Black Wednesday" was racially offensive and demonstrates a racially hostile environment at the Sheriff's Department. Petitioner acknowledged that this comment referenced a day when black residents were planning to boycott certain local merchants. The comment was made in reference to scheduling the day on which Petitioner would be taken to lunch by her co-workers for Secretaries Day. (R2-19; Petitioner's Dep., pp. 92-93).

Petitioner also relies upon a private comment made by Major Miller to Tim Pounds. Tim Pounds is a black officer at the Sheriff's Department and is Petitioner's brother-in-law. (R2-19; Petitioner's Dep., p. 99). Major Miller apologized to Petitioner for making the comment. Petitioner admitted that Major Miller said he was sorry that Petitioner heard the remark that Miller made to Tim Pounds. (R2-19; Petitioner's Dep., pp. 354-355; Miller Dep. pp. 29-30). Petitioner also discussed this incident with Tim Pounds that evening, and Tim Pounds told her that the comment was a joke and he "did Phil Miller the same way." (R2-19; Petitioner's Dep., pp. 99-100, 102). Clearly, Major Miller's comment was not made to Petitioner or in reference to her and, therefore, does not demonstrate a racially hostile work environment. The fact that the comment was not objectively hostile to the Petitioner also is reflected by the fact that Petitioner did not complain to Sheriff Waldrop about Major Miller's comment until much later when she met with Sheriff Waldrop on June 14, 1993, to discuss her suspension and proposed termination. When she made Sheriff Waldrop aware of the comment, Sheriff Waldrop discussed this incident with Major Miller. Although it was clear that the comment was of a private, consensual nature between two long-time friends and was inadvertently overheard by the Petitioner, Sheriff Waldrop emphasized to Major Miller that the use of any racial comments, even in jest, was inappropriate in the office. (R2-19; Waldrop Dep., p. 20; Waldrop Aff.).

Petitioner also contends that a non-supervisory co-worker, Billy Lashley, called her "Buckwheat." According to Petitioner, Lashley was standing near her desk, talking with the other secretary, Donna Hartsfield, and when Petitioner walked past him, Lashley said, "Hey, Buckwheat." (R2-19; Petitioner's Dep., p. 105). Petitioner contends this took place in the Investigations Division near her desk and admits that no one heard the comment other than the other secretary, Donna

Hartsfield. Petitioner admits that she *never complained* about the alleged comment from Lashley until she filed her Charge of Discrimination with the EEOC. (R2-19; Petitioner's Dep., p. 107).

Petitioner contends that she heard Major Stan Copeland use the phrase "black ass" on one occasion, when referring to an unidentified black inmate. Petitioner could not recall when Stan Copeland used this phrase and could not identify the inmate to whom Copeland was supposedly referring. (R2-19; Petitioner's Dep., pp. 108-109). Petitioner also contends that she heard unidentified trustee inmates use the word "nigger," but offers no specifics regarding when this occurred, to whom the inmates were supposedly referring, or who heard the inmates use this word. (R2-19; Petitioner's Dep., pp. 109-110).

Reviewing Petitioner's "evidence" of an alleged hostile environment, it is clear that virtually all of the comments were either not racially offensive, or were ambiguous at best. Also, virtually all of the comments were *overheard* by Petitioner during private conversations, including conversations by inmates. These comments were not sufficiently "severe" to constitute an abusive working environment or so "pervasive" or frequent as to have altered the condition of Petitioner's employment.

In order to establish a claim for hostile environment through comments, it is axiomatic that the comments must be *frequent and severe*, and must be examined carefully to determine whether they were *physically threatening or humiliating*, or just mere offensive utterances. *Harris*, 114 S. Ct. at 371. As the Court in *Harris* emphasized, Title VII was not intended to police every private conversation made between co-workers, and indeed, courts have recognized that a few isolated or stray derogatory comments do not give rise to a cause of action for damages under Title VII.

In this case, of the seven comments relied upon by the Petitioner, in three instances, she failed to even identify who allegedly made the comments. Four of the comments *do not even reference race* and, by any objective measure, do not constitute a racial comment. Distilled to their essence, Petitioner's claim of hostile environment center upon (1) the alleged comment by two white inmates in November, 1990; (2) a comment by Mr. Lashley; (3) the "Black Wednesday" secretary's luncheon and (4) the comment by Mr. Miller to Tim Pounds. These incidents, individually or taken together, do not form the type of frequent and pervasive comments necessary to state a hostile environment claim. *Harris*, 510 U.S. at 21.

B. Douglas County Cannot Be Vicariously Liable For Petitioner's Allegations Of Racially Hostile Work Environment

In the *Ellerth* and *Faragher* decisions this Court held that an employer is entitled to an affirmative defense to liability and damages in those cases where the victim suffered no tangible employment action by the alleged harassing supervisor. The employer may establish this affirmative defense by establishing that,

> (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 118 S. Ct. at 2270. In the case at bar, Douglas County has established its entitlement to avail itself of this affirmative defense.

Douglas County implemented and maintained a policy that it does not condone or permit unlawful discrimination. This policy and the Douglas County Merit System provide a mechanism for employees to report their grievances, including any alleged unlawful or unwelcome conduct. (R2-19; Turner Aff., Ex. 1; Douglas County Merit System, Sections 13-16 and 13-50). Notwithstanding this policy and the related grievance procedures provided under the Douglas County Merit System, it is utterly without dispute that Petitioner failed to timely complain about any of the alleged incidents upon which she now relies to show a triable issue of hostile environment. (R2-19; Petitioner's Dep., pp. 90-91, 235, 241, 382).

Even in her termination meeting with Sheriff Waldrop, Petitioner did not say she was discriminated against or harassed based upon her race. Thus, it is completely without dispute that the Petitioner never utilized the available grievance procedure to report her alleged concerns of racial harassment. Therefore, Douglas County is entitled to an affirmative defense insulating itself from liability as a matter of law for Petitioner's claim of hostile environment based on race.

CONCLUSION

The district court properly granted summary judgment to Douglas County. Both here and in the proceedings below, Douglas County respectfully submits that the record has presented substantial evidence demonstrating that Petitioner failed to raise a genuine issue of material fact requiring resolution by trial. The overwhelming weight of the evidence amply demonstrates that Petitioner failed to establish facts sufficient to support a finding of a hostile work environment based upon her race. Moreover, Petitioner has equally failed to overcome the affirmative defense established by Douglas County as authorized by this Court's most recent decisions in this area.

The Respondents respectfully request that the instant Petition be denied and the decisions of the lower courts granting summary judgment in their favor be upheld in their entirety.

Respectfully submitted,

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